CASE NO. 03-15-00783-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

WALLACE L. HALL, JR., in his official capacity as a Regent for The University of Texas System,
Appellant,

v.

WILLIAM H. MCRAVEN, in his official capacity as Chancellor for The University of Texas System,
Appellee.

On Appeal from the 200th District Court of Travis County, Texas
The Honorable Scott Jenkins, Presiding

BRIEF OF KEN PAXTON, ATTORNEY GENERAL OF TEXAS, AS AMICUS CURIAE SUPPORTING APPELLANT WALLACE L. HALL, JR.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Litigation

NICHOLE BUNKER-HENDERSON
Chief, Administrative Law Division

KIMBERLY L. FUCHS
State Bar No. 24044140
Assistant Attorney General
Administrative Law Division
Office of the Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4195
Facsimile: (512) 320-0167

ATTORNEYS FOR AMICUS CURIAE KEN PAXTON, ATTORNEY GENERAL OF TEXAS

March 18, 2016

IDENTITY OF PARTIES AND COUNSEL

PARTIES TO THE TRIAL COURT JUDGMENT:

Plaintiff: Wallace L. Hall, Jr.

Defendant: William H. McRaven

APPELLATE COUNSEL:

For Appellant/Plaintiff, Wallace L. Hall, Jr.:

Joseph R. Knight
LAW OFFICE OF JOSEPH R. KNIGHT
111 Congress Ave., Suite 2800
Austin, Texas 78701
Telephone: (512) 457-0231
Facsimile: (512) 684-7681
jknight@knighttxlaw.com

For Appellee/Defendant, William H. McRaven:

Patton G. Lochridge
State Bar 12458500
Richard D. Milvenan
State Bar 14171800
Blaire A. Knox
State Bar 24074542
MCGINNIS, LOCHRIDGE & KILGORE
600 Congress Ave., Suite 2100
Austin, Texas 78701
Telephone: (512) 495-6044
Facsimile: (512) 505-6344
plocbridge@mcginnislaw.com
rmilvenan@mcginnislaw.com
bknox@mcginnislaw.com

INTEREST OF AMICUS CURIAE KEN PAXTON

Amicus Curiae Ken Paxton, Attorney General of Texas, has an interest in this case because this case involves the availability of records to a state official. Additionally, the Attorney General has previously issued an opinion on this issue. Amicus believes the trial court's decision incorrectly granted Chancellor McRaven's Plea to the Jurisdiction, and incorrectly denied Regent Hall's Motion for Summary Judgment. Amicus believes this Court should reverse and render in Regent Hall's favor.

Amicus has not been paid any fee, nor will be paid any fee, for the preparation of this brief.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

FEDERAL STATUTE

TEXAS STATUTES

RULES

Regents' *Rules and Regulations*

TEXAS ATTORNEY GENERAL OPINIONS

TEXAS ATTORNEY GENERAL OPINIONS (Continued)

STATEMENT OF THE CASE

Amicus adopts Appellant's Statement of the Case in his Brief, at vii.

ISSUE(S) ADDRESSED BY AMICUS

Amicus addresses the following issue(s):

1. A regent must be allowed access to records to fulfill his or her duty to the University.

2. In this case, Regent Hall should be provided access to the records at issue.

CASE NO. 03-15-00783-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

WALLACE L. HALL, JR., in his official capacity as a Regent for The University of Texas System,
Appellant,

v.

WILLIAM H. MCRAVEN, in his official capacity as Chancellor for The University of Texas System,
***Appellee*.**

On Appeal from the 200th District Court of Travis County, Texas
Cause No. D-1-GN-15-002473
The Honorable Scott Jenkins, Presiding

BRIEF OF KEN PAXTON, ATTORNEY GENERAL OF TEXAS, AS AMICUS CURIAE SUPPORTING APPELLANT WALLACE L. HALL, JR.

TO THE HONORABLE JUSTICES OF THE THIRD COURT OF APPEALS:

Regent Hall has a fiduciary duty to the University of Texas as a member of the Board of Regents. He is simply asking to view University records in his official capacity in order to fulfill this duty. Regent Hall must not be denied this access.

STATEMENT OF FACTS

Amicus adopts Appellant's Statement of the Facts in his Brief, at 2-12.

SUMMARY OF THE ARGUMENT

A Regent has a right to view University records and a denial of this right impedes on the Regent's ability to fulfill his fiduciary duties. The Attorney General has opined that a University official has a non-discretionary duty to its regents to provide such records, so long as no state or federal law prevents it from doing so. In this case, the University has cited to several laws to justify its refusal to allow Regent Hall to view the records. However, none are applicable. Therefore, the University must be required to allow Regent Hall to view unredacted copies of the records he needs to fulfill his fiduciary duty to the University.

ARGUMENT

I. A regent must be allowed access to records to fulfill his or her duties to the University.

A. The rights and duties of a regent

Every member of a board of regents of a Texas university has a fiduciary duty to the university which they serve. Tex. Educ. Code § 51.352(e). In order to fulfill that fiduciary duty, a regent must not be denied access to records he or she deems necessary to fulfill those duties. The rules of The University of Texas System Board of Regents (the University) acknowledge this necessity and provide: "Members of the Board of Regents are to be provided access to such information as will enable them to fulfill their duties and responsibilities as Regents of the U. T. System." Regents' *Rules and Regulations*, Rule 10101 § 3.1.

Texas courts have examined the relationship between fiduciary duties and access to records in the corporate context and have determined the access to records must be absolute in a fiduciary relationship. The Fourteenth Court of Appeals explained:

> It would seem to be axiomatic that the individual director cannot make his full contribution to the management of the corporate business unless given access to the corporation's books and records. The information therein contained is ordinarily requisite to the exercise of the judgment required of directors in the performance of their fiduciary duty so much so that the directors' right of inspection has been termed absolute, during their continuance in office at all reasonable times.

Chavco Inv. Co., Inc. v. Pybus, 613 S.W.2d 806, 810 (Tex. Civ. App—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (citing Fletcher, Cyclopedia of the Law of Private Corporations § 2235 at 771 (rev. perm. ed. 1976)).

However, in this case, the University has relied on a provision of its rules which allows the Chancellor to ask the Board to vote on whether to allow an individual regent access to records if he has concerns about the request. Regents' Rule 10801 § 5.4.5.

This cannot be permitted. As explained above, a regent's access to University records must be absolute. The fiduciary duty belongs to the individual regent, and denying an individual access to the information needed to fulfill that duty frustrates the individual's ability to fulfill the mandate placed on him or her by the legislature.

B. Attorneys General opinions

The Attorney General opined that a university may not prevent an individual regent from obtaining access to records the regent believes are necessary to fulfill his or her duties as a regent. Tex. Att'y. Gen. Op. No. KP-0021 (2015). This is consistent with previous Attorneys General opinions, which have held that members of a governing body have an inherent right to access records to perform duties in their official capacities. Tex. Att'y Gen. Op. Nos. GA-0138 at 3 (2004), JC-0283 at 3-4 (2000), JC-0120 at 3 (1999), JM-119 at 3 (1983). Where an inherent right exists, a governing body may not take that right away.

C. The University has a non-discretionary duty to provide records to a regent who believes the records are necessary to fulfill his duty.

As explained in the Attorney General's opinion, "a governmental body cannot adopt a policy that prevents a member of the body from performing the duties of office." Tex. Att'y Gen. Op. No. KP 0021 at 4 (citing Tex. Att'y Gen. Op. No. JC-0120). Absent a legislative grant of specific authority for a governing board to limit its members access to information through a majority vote, the general rulemaking authority of an entity does not give a board the authority to restrict access to information its members have an inherent right to view. Tex. Att'y Gen. Op. No. LO-93-069 at 5 (1993). No such legislative grant of authority exists here. Unless a state or federal law requires otherwise, the University must comply with a request to obtain records from a regent who believes such access is necessary to fulfill his

duties. Tex. Att'y Gen. Op. No. KP 0021. Therefore, the University has a non-discretionary duty to provide access to Regent Hall to view the University records in his official capacity as a regent.

II. In this case, Regent Hall should be provided access to the records at issue.

Regent Hall has a fiduciary duty to the University, and he must not be prevented from exercising that duty by the University he was appointed to serve. In this case, Regent Hall's attempts to obtain documents he has stated he needs in order to fulfill his duties were met with procedural bars and the misapplication of privacy laws.

A. The retroactive vote

Setting aside the impermissibility of allowing the regents to vote to deny access to records to another regent, Regent Hall obtained the necessary votes to view an unredacted copy of the records in accordance with the rule in place at the time he made the request. It was only after the Board superceded its own rule that Regent Hall's request was voted down.

At the time of the request, only two members of the Board needed to approve an individual's request to access records even if the Chancellor had concerns about the request. Appellant Br. at 7. Regent Hall received three votes in his favor when the original vote was taken. *Id.* at 8. After Chancellor McRaven refused to honor the original vote, the Board changed its rule to the current version of Rule 10801

§ 5.4.5, which requires majority approval. *Id* at 9. The majority rejected Regent Hall's request and offered to give him access to the records only in redacted form. *Id.* at 11.

As a general rule, law cannot be applied retroactively. Tex. Const. art. I, § 16. The Supreme Court explained that although not all retroactive laws will violate the Constitution, the presumption against retroactivity has two major purposes. *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 139 (Tex. 2010). The first is to protect reasonable, settled expectations. *Id.* Here, Regent Hall had a reasonable expectation his request to see the University's records would be handled in accordance with the Board's established, published rules. The second objective is to prevent abuses of power. *Id.* The law cannot be changed as a means of retribution against certain people or groups. *Id.* According to Regent Hall's pleadings in the trial court, the Board's rules were changed in direct response to his request to access the information. Pl.'s Resp. to Plea and Mot. Summ. J. at 15.[1] The Constitution prevents the abuses of power that arise when individuals are singled out for special reward or punishment. *Robinson*, 335 S.W.3d at 145.

The Board rules provide that they be given the same force as statutes, and the Supreme Court has long held the same. Regents' Rule 10101 § 1; *Foley v. Benedict*,

[1] Although an official clerk's record has been submitted for this appeal, the Attorney General is not a party to the appeal. Therefore, all trial document references are to the actual pleadings submitted in *Wallace L. Hall, Jr. v. William H. McRaven*, No. D-1-GN-15-002473 (200th Dist. Ct., Travis County, Tex. Dec. 15, 2015).

55 S.W.2d 805, 808 (Tex. 1932). Therefore, the Board's rules are also prevented from being applied retroactively.

As discussed above, the University cannot have a valid rule allowing regents to vote to deny access to records to another regent. Furthermore, even assuming such a rule is valid, in this case, the second vote would not be valid. Regent Hall gained the necessary votes to allow him to access the records under the rules in effect when his request was made. The current version of Rule 10801 § 5.4.5 has no applicability here.

B. The proposed redactions

Following the change in Board rules, the Board voted to offer Regent Hall access to a redacted copy of the records he requested, with student names, among other things, removed from the records. Appellant Br. at 11. The University cited various state and federal privacy laws to justify these redactions. *Id.*

However, Regent Hall maintains he needs access to unredacted copies of the records to fulfill his duties to the University. As such, he is entitled to have his request fulfilled.

The privacy laws[2] cited by the University are simply not applicable here. First, Regent Hall is not asking for the release of any information. He is simply

[2] The University cites the Family Educational Rights and Privacy Act ("FERPA"), the Health Insurance Portability and Accountability Act ("HIPAA"), common-law privacy, constitutional privacy, and the Texas Identity Theft Enforcement and Protection Act as law requiring it to redact personal information before allowing Regent Hall to view the documents. Def.'s Plea at 22-25.

asking to view the records. Appellant Br. at 1, 27-28. More importantly, Regent Hall is not asking for access to these records as a member of the public. He is asking for them in his official capacity as a Regent of the University of Texas System, who owes certain duties to the University. *Id.* at 28. The University has not interpreted the privacy laws to apply to University officials acting in their official capacities in the past. At a minimum, the University allowed access to the unredacted information to 1) the University General Counsel who conducted an internal investigation, and 2) any University employees who participated in this investigation under his direction. Employees of Kroll Inc., who were *not* University employees, were also given unrestricted access to the data. Pl.'s Resp. to Plea and Mot. Summ. J. at 5-6.

After giving unrestricted access to the unredacted data to other individuals acting in their official capacities, the University is now denying the same to Regent Hall.

Furthermore, the Board's own rules assume regents will have access to information that is confidential by law, and address the situation by stating: A Regent may not publicly disclose information that is confidential, by law, unless disclosure is required by law or made pursuant to a vote of the Board to waive an applicable privilege. Regents' Rule 10101 § 3.3. If the Board's policy was meant to require redaction of confidential information before allowing access to a regent, this rule would be superfluous.

C. FERPA

Additionally, Regent Hall has stated his purpose for viewing these records is to fulfill his official duty. Appellant Br. at 6, 20. The Family Educational Rights and Privacy Act ("FERPA"), which is heavily relied on as the justification for the University's redactions, specifically exempts school officials with legitimate educational interests from its breadth. 20 U.S.C. § 1232g(b)(1)(A) (2012). The desire to fulfill an official duty would certainly be a legitimate educational purpose, and there is nothing in the record indicating that Regent Hall has any other purpose in obtaining access to these records.[3]

D. The state law claims

The University also claims it is redacting information pursuant to both common-law and constitutional privacy, but neither of these doctrines are applicable to Regent Hall's official capacity request.

Common-law privacy protects only highly intimate or embarrassing information about one's personal life, the disclosure of which would be highly objectionable to a reasonable person. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Admissions records are not highly intimate or embarrassing private information under the common-law privacy test. *Id.* (compare

[3] HIPAA was also raised, but the University has acknowledged it has not identified any documents to which that statute would apply. Def.'s Plea at 23. Therefore, the Attorney General will not brief its application.

to claims of injuries from sexual assault, a claim on behalf of illegitimate children, claim for expenses of pregnancy due to failure of contraceptive device, claims for psychiatric treatment, claims for injuries stemming from attempted suicide); *see also Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 551 (Tex. App.—Austin 1983, writ ref'd n.r.e.)(distinguishing the "intimate or embarrassing information" in *Industrial Foundation* from the material sought in *Hubert* (names of candidates for Texas A&M University president)). The University has cited no authority suggesting admissions records meet that test. Although the University cites several cases holding educational records were covered by common-law privacy, all of these cases involve the types of information specifically contemplated by the *Industrial Foundation* test, and can be easily distinguished from admissions records. Appellee Br. at 46 n.30; *see L.S. v. Mount Olive Bd. of Educ*., 765 F. Supp. 2d 648, 661-62 (D.N.J. 2011)(involving psychiatric records*); CN. ex rel. J.N. v. Ridgewood Bd. of Educ.*, 319 F. Supp. 2d 483, 496 (D.N.J. 2004), *aff'd sub nom. CN. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005)(involving survey relating to sexuality and relationships); *Merriken v. Cressman*, 364 F. Supp. 913, 922 (E.D. Pa. 1973)(involving evaluating students' family lives to predict future drug use).

The University also cites *McGilvray v. Moses* for the proposition that Texas courts have applied common-law privacy to the disclosure of educational records. However, this case deals with a teacher who was terminated for violations of FERPA

and school policy, not common-law privacy. 8 S.W.3d 761, 765 (Tex. App.—Fort Worth 1999, pet. denied).[4]

Constitutional privacy is also inapplicable. The United States Supreme Court has found constitutional privacy to protect two different kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); *Ramie v. City of Hedwig Vill., Tex.*, 765 F.2d 490, 492 (5th Cir. 1985). The first involves autonomy in decisions falling under the "zones of privacy," relating to marriage, procreation, contraception, family relationships, and child rearing and education. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second is in freedom from *public disclosure* by the government of certain personal matters of citizens, sometimes referred to as the "right to confidentiality," or "informational privacy." *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977); *Ramie*, 765 F.2d at 492; *Plante v. Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978); *but see Am. Fed'n of Gov't Emps., AFL-CIO v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997) (expressing "grave doubts" as to existence of constitutional right of privacy in nondisclosure of personal information). This second aspect balances the individual's privacy interest against the government's legitimate interests, and is reserved for "the most intimate aspects of human affairs." *Ramie*, 765 F.2d at 492.

[4] The University also cites Tex. Att'y Gen. ORD-230 (1979). However, the information that was allowed to be withheld was under the Informer's Privilege. The Attorney General concluded the information was not excepted from disclosure under common-law privacy.

Allowing a regent of a university to view university records is not a public disclosure to which this doctrine applies. Furthermore, a regent of a university has a legitimate government interest in viewing student application materials.

The University also raises the Texas Identity Theft Enforcement and Protection Act, which requires businesses to take reasonable steps to protect "sensitive personal information" collected or maintained by the business in the regular course. Appellee Br. at 46 n.30. This statute is designed to prevent businesses from publically releasing personal information as to prevent it from landing in the hands of a person attempting to steal another's identity. Tex. Bus. & Com. Code § 521.052. The Texas Identity Theft Enforcement and Protection Act simply has no applicability here.

As stated above, Regent Hall has stated that he needs to view unredacted copies of the information he requested to fulfill his official duty. None of the privacy statutes cited apply to University records when a University regent is acting in his official capacity.

Furthermore, law and policy ensure that Regent Hall can only use the information he obtains for proper, official capacity purposes. Both the Board's rules and Texas law ensure that Regent Hall can only use the information he obtains for legitimate educational interests, providing a criminal penalty for the use or disclosure of information that has not been made public. *See* Regents' Rule 10101

§ 3.3; Tex. Penal Code § 39.06 (Misuse of Official Information). If Regent Hall's purpose was not for a legitimate educational interest, his conduct would be punishable under the penal code. There is no indication in the record that this is the case, and the University has no basis to assume the information requested will be used in a way as to violate state and federal privacy laws.

For the above reasons, the Attorney General asserts that Chancellor McRaven has a ministerial duty to make unredacted copies of the requested records available to Regent Hall in response to his official capacity request.

CONCLUSION AND PRAYER

The Attorney General respectfully asks the Court to: 1) declare that Appellee's Plea to the Jurisdiction was granted in error; 2) declare that Appellant's Motion for Summary Judgment was denied in error; 3) reverse the trial court's grant of Appellee's Plea to the Jurisdiction; and 4) render judgment in favor of Appellant.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Litigation

NICHOLE BUNKER-HENDERSON
Chief, Administrative Law Division

/s/ Kimberly L. Fuchs
KIMBERLY L. FUCHS
State Bar No. 24044140
Assistant Attorney General
Administrative Law Division
Office of the Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4195
Facsimile: (512) 320-0167
kimberly.fuchs@texasattorneygeneral.gov

Attorneys for Amicus Curiae
Ken Paxton, Attorney General of Texas

CERTIFICATE OF COMPLIANCE

I certify that the Brief of Ken Paxton, Attorney General of Texas, as Amicus Curiae, submitted complies with Rule 9 of the Texas Rules of Appellate Procedure and the word count of this document is 3,074. The word processing software used to prepare this filing and calculate the word count of the document is Microsoft Word 2013.

Date: March 18, 2016

/s/ Kimberly L. Fuchs
Kimberly L. Fuchs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Ken Paxton, Attorney General of Texas, as Amicus Curiae, has been served on March 18, 2016, on the following counsel-of-record via e-service:

Joseph R. Knight
State Bar No. 11601275
LAW OFFICE OF JOSEPH R. KNIGHT
111 Congress Ave., Suite 2800
Austin, Texas 78701
Telephone: (512) 457-0231
Facsimile: (512) 684-7681
jknight@knighttxlaw.com

ATTORNEY FOR APPELLANT, WALLACE L. HALL, JR.

Patton G. Lochridge
State Bar 12458500
Richard D. Milvenan
State Bar 14171800
Blaire A. Knox
State Bar 24074542
MCGINNIS, LOCHRIDGE & KILGORE
600 Congress Ave., Suite 2100
Austin, Texas 78701
Telephone: (512) 495-6044
Facsimile: (512) 505-6344
plocbridge@mcginnislaw.com
rmilvenan@mcginnislaw.com
bknox@mcginnislaw.com

ATTORNEYS FOR APPELLEE, WILLIAM H. MCRAVEN

/s/ Kimberly L. Fuchs
Kimberly L. Fuchs
Attorney for Amicus Curiae
Ken Paxton, Attorney General of Texas